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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

(1) Is 29 C.F.R. § 1601.12(b), which provides that a Title VII "charge may be amended to cure technical defects or omissions, including the failure to verify the charge," invalid?

(2) If section 1601.12(b) is invalid, is equitable tolling appropriate with regard to a charging party who relied on that regulation?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Leonard Edelman respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on October 2, 2000.

OPINIONS BELOW

The October 2, 2000 opinion of the court of appeals, which is reported at 228 F. 3d 503 (4th Cir. 2000), is set out at pp. 1a-15a of the Appendix to this petition. The September 20, 1999 memorandum opinion of the district court, which is reported at 66 F. Supp. 2d 777 (W.D.Va. 1999), is set out at pp. 18a-25a of the Appendix. The September 20, 1999 order of the district court, which is not officially reported, is set out at pp. 16a-17a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on October 2, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATION INVOLVED

Section 706(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), states in pertinent part, "Charges shall be in writing under oath and shall contain such information and be in such form as the Commission requires."

Section 706(e)(1), 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days

after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Section 1601.12(b) of 29 C.F.R. provides in pertinent part:

> [A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including the failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received.

STATEMENT OF THE CASE

Petitioner Leonard Edelman was hired in 1993 as a member of the biology faculty at respondent Lynchburg College. In 1996 he applied for tenure. Despite favorable recommendations from the chair of his department and a faculty committee, on June 6, 1997 the president of the college advised Edelman by letter that tenure had been denied. As a result of that denial of tenure, Edelman's employment by the college ended.

On November 14, 1997, Edelman sent to the Richmond office of the EEOC a five page single-spaced letter alleging that the denial of tenure and consequent dismissal were the result of discrimination on the basis of gender, religion and national origin. (Pet. App. 2a). The letter asserted that the Dean of the college had been systematically purging white men from the faculty, and concluded:

> I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of Trustees) and I call upon the EEOC to investigate this case . . .

(Pet. App. 2a). The letter was not submitted under oath.

On November 26, 1997, Edelman's attorney sent another letter to the EEOC. It requested that an agency investigator

interview Edelman prior to serving final charging documents on the college. This letter cautioned,

> It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.

(Pet. App. 2a). EEOC officials never disputed the attorney's understanding that the November 14 letter had constituted a Title VII charge.

EEOC did not schedule the requested interview until March 3, 1998. On March 18, 1998, the EEOC mailed to Edelman for his signature under oath an EEOC Form 5, Charge of Discrimination, it had prepared based on his allegations. The accompanying letter characterized Edelman's earlier letter as a "charge of employment discrimination," and set no deadline for the return of that Form. Edelman's verified Form 5 was filed with the EEOC on April 15, 1998. After completing its investigation, the EEOC issued Edelman a right-to-sue letter on March 26, 1999.

Edelman initially filed this action in state court, alleging a violation of Title VII and of a variety of state law claims. Lynchburg college removed the action to federal court. The College moved to dismiss the Title VII claim on the ground that Edelman had failed to file a timely charge of discrimination.

Under the terms of Title VII, Edelman was obligated to file such a charge within 300 days of the June 6, 1997 letter notifying him of the denial of tenure. Edelman's November 14, 1997 letter fell well within the limitations period, but the verified Form 5 was not received until 313 days after June 6, 1997. (Pet. App. 3a). Officials at the EEOC's Richmond office submitted declarations stating that the substantive allegations of the November 14, 1997 letter were sufficiently detailed to constitute a charge, and that the EEOC had regarded the verified Form 5 as relating back to the earlier letter.[1]

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[1] J. App. 80-81, 90-91.

The district court dismissed Edelman's Title VII claims on the ground that he had not filed a timely Title VII charge, and remanded his remaining state law claims to state court. On appeal, the Fourth Circuit concluded that the controlling problem was that the November 14 "letter was not sworn to under oath or affirmation." Section 706(b) states that a charge "shall be in writing under oath or affirmation." (Pet. App. 4a). Edelman relied on an EEOC regulation which permits such a lack of verification to be corrected by a later sworn statement. "A charge may be amended to cure technical defects or omissions, including the failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received." 29 C.F.R. § 1601.12(b).

The appeal thus turned on a dispute regarding the validity of this EEOC regulation.

> The parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties disagree, however, as to whether the regulation may be so applied.

(Pet. App. 4a). A majority of the court of appeals concluded that the regulation was invalid, insisting that the language of Title VII unambiguously required that the EEOC receive a sworn charge within the 300 day limitation period. (Pet. App. 6a). The majority opinion acknowledged that its analysis "conflicts with that of several other circuits" which had upheld the regulation in question. (Pet. App. 9a).

The majority also rejected Edelman's argument that his reliance on the disputed regulation warranted equitable tolling. (Pet. App. 12a). In a concurring opinion, Judge Luttig argued that the regulation was valid, but would on other grounds have affirmed the dismissal of the Title VII claims. (Pet. App. 14a-15a).

REASONS FOR GRANTING THE WRIT

There is a Conflict among the Circuits Regarding the Validity of an Important EEOC Regulation

The Fourth Circuit has declared invalid a 34 year old[2] EEOC regulation of great practical importance to the manner in which that agency carries out its statutory responsibilities. The EEOC receives each year more than 30,000 charges subject to the Title VII administrative processes.[3] Although section 706(b) of Title VII requires that charges be under oath, virtually none of the charging parties know this when they first contact EEOC;[4] often, as here, aggrieved individuals write letters to the nearest EEOC office. Pursuant to 29 C.F.R. § 1601.12(b), the EEOC has since 1966 deemed any written charge sufficient to meet the applicable filing deadlines, so long as a sworn charge is ultimately submitted; that verification is treated under the regulation as relating back to the date of the original written charge. The court of appeals, in declaring invalid section 1601.12(b), has overturned this long established agency regulation and practice.

The conflict among the circuits about this issue is now widely recognized. In its decision below, the Fourth Circuit expressly disagreed with contrary decisions in the Fifth, Seventh, Ninth and Tenth Circuits.[5]

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[2] The regulation at issue was originally promulgated by the EEOC on July 29, 1966. 31 Fed. Reg. 10269 (1966). Prior to 1977 it was set forth in 29 C.F.R. § 1601.11(b)(1975).

[3] Employment discrimination charges under the Americans With Disabilities Act are enforced through the Title VII processes. In fiscal year 1999 the EEOC received 17,007 Title VII charges and 17,883 charges under the ADA.

[4] The current EEOC website posting regarding the filing of an administrative charge makes no mention of this requirement. Rather, it simply invites aggrieved persons, inter alia, to write to the nearest EEOC office. http://www.eeoc.gov/.

[5] Pet. App. 9a (disagreeing with the decisions in *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321 (7th Cir. 1991), *Peterson v. City of Wichita*, 888 F. 2d 1307 (10th Cir. 1989), *Casavantes v. California State Univ.*, 732 F. 2d 1441 (9th Cir. 1984), and *Price v. Southwestern Bell Tel. Co.*, 687 F. 2d 74 (5th Cir. 1982).

> [W]e are mindful that our analysis conflicts with that of several other circuits. . . . Other circuits have approved the application of the regulation to permit the relation-back of charges that were verified after the limitations period. . . . We disagree with these decisions . . . because we believe that they improperly substitute policy justifications for clear statutory language.

(Pet. App. 9a-11a). The court below was particularly critical of the contrary decision of the Seventh Circuit in *Philbin v. General Electric Capital Auto Lease*, 929 F. 2d 321 (7th Cir. 1991). (Pet. App. 9a-11a).[6]

The Eighth and Tenth Circuits have also recognized the existence of this conflict. The problem often arises when a complainant visits an EEOC office and fills out an EEOC "intake questionnaire", which is not verified; agency officials then use the questionnaire to prepare a second document the complainant then signs under oath. Frequently, only the Intake Questionnaire is signed prior to the expiration of the time period for filing a Title VII complaint.

> Courts are split on how to deal with the two documents. The Eighth Circuit generally rejects the notion that they should be read together such that a verified charge filed after the filing deadline relates back to the intake questionnaire and makes the questionnaire a timely filed charge. . . . The Seventh Circuit has held that a timely filed questionnaire followed by an untimely but verified charge 'may be sufficient to constitute a charge in some circumstances,' *Philbin* . . . .

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[6] "The court [in *Philbin* and *Choate*] . . . stated that the verification requirement was 'directory and technical rather than mandatory . . .' . . . . In contrast to the Seventh Circuit, we have previously held that the oath requirement contained in Title VII 'is cast in mandatory terms.' . . . In applying the Chevron analysis, the court failed to give sufficient weight to the plain language of the statute, focusing instead on whether the EEOC's regulation represented a reasonable interpretation of the statute."(Citations omitted).

Welsh v. City of Shawnee, 1999 WL 345597 *5 n. 6 (10th Cir. 1999); *see Shempert v. Barwick Chemical Corp.*, 151 F. 3d 793, 796-97 n. 7 (8th Cir. 1998);[7] *Diez v. Minnesota Min. and Mfg. Co.*, 88 F. 3d 672, 675 and n. 4 (8th Cir. 1996).[8]

In the instant case the Fourth Circuit concluded that section 1601.12(b), insofar as it authorizes a later-filed sworn charge to relate-back to an earlier timely but unsworn charge, is invalid.[9] The Eighth Circuit has reached the same result, holding that the terms of Title VII itself preclude any such relation-back of a later verification, and noting--but refusing to apply--section 1601.12(b). *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793, 796 and n. 7 (8th Cir. 1998)(noting conflict); *Schlueter v. Anheuser-Busch, Inc.*, 132 F. 3d 455, 458 (8th Cir. 1998)(panel "bound by Eighth Circuit case law" and prefacing quotation from regulation with "But, cf."); *Diez v. Minnesota Min. and Mfg. Co.*, 88 F. 3d 672, 675 (8th Cir. 1996)(same); *Hodges v. Northwest Airlines, Inc.*, 990 F. 2d 1030, 1032 (8th Cir. 1993)(citing Fourth Circuit precedent).

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[7] "Several circuits hold that an Intake Questionnaire cannot serve as an administrative charge. *See . . . EEOC v. Appalachian Power Co.*, 568 F. 2d 354, 355 (4th Cir. 1978) . . . . Other circuits have held that a timely-filed Intake Questionnaire can serve as an administrative charge if subsequently verified. *See Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F. 2d 321 (7th Cir. 1991) . . . ; *Peterson v. City of Wichita*, 888 F. 2d 1307 (10th Cir. 1989) . . . . Still other circuits have held that an Intake Questionnaire qualifies as a charge if it satisfied the requirements of 29 C.F.R. § 1601.12(b). *See Clark v. Coats & Clark, Inc.*, 865 F. 2d 1237, 1239-41 (11th Cir. 1989) . . .; *Casavantes v. California State Univ.*, 732 F. 2d 1441 (9th Cir. 1984)."

[8] After noting that Eighth Circuit precedent rejected relation-back of a subsequent verification, the court noted that there were decisions to the contrary in the Seventh, Ninth and Tenth circuits.

[9] "[H]aving concluded that application of the EEOC's regulation in this case contravenes Congress's intent, as expressed through the plain language of the statute, we need not proceed further. . . . In keeping with the tradition that requires us to protect the will of Congress, we hold that the regulation, 29 C.F.R. § 1601.12(b), may not be applied to allow Edelman's untimely charge to relate back to his November 14, 1997 letter."

The EEOC has repeatedly, but without success, urged the Eighth Circuit to apply section 1601.12(b).[10]

On the other hand, a total of seven other circuits have held that the subsequent filing of a verified but untimely charge will relate back to an earlier, timely but unsworn complaint. In the years immediately following the enactment of Title VII, the statute itself was universally interpreted in this manner.[11]

The Fifth, Seventh, and Tenth Circuits have expressly rejected challenges to the validity of section 1601.12(b). *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321, 323 (7th Cir 1991)(disapproving district court decisions which had held regulation invalid; "EEOC has the power to decide that a subsequent verification of a written statement relates back to the date of the initial filing and satisfied the statutory requirement"); *Peterson v. City of Wichita*, 888 F. 2d 1307, 1308-09 (10th Cir. 1989)(reversing district court decision which had held regulation invalid; "an unverified charge is a timely filing if it is subsequently amended by a charge executed under oath or affirmation"); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 466 (5th Cir. 1969)(noting that earlier Fifth Circuit decisions had "approved the EEOC's regulation"); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 230-31 (5th Cir. 1969)(affirming district court decision which "sustained the validity of" the predecessor of section 1601.12(b)).[12]

The Seventh and Tenth Circuits have concluded, contrary to the decision below, that the EEOC interpretation of Title VII embodied in section 1601.12(b) is entitled to substantial

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[10] Brief of the EEOC as Amicus in Support of Appellant, Shempert v. Harwick Chemical Corp., No. 97-1634 (8th Cir.); Brief of the EEOC as Amicus Curiae, Schlueter v. Anheuser-Busch, Inc., No. 97-1603 (8th Cir.); Brief of the EEOC as Amicus in Support of the Appellant, Lawrence v. Cooper Communities, Inc., No. 97-1338 (8th Cir.).

[11] *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 357 (6th Cir. 1969)(citing cases); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 266 (5th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 230-31 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357, 359-60 (7th Cir. 1968).

[12] See *Price v. Southwestern Bell Telephone Co.*, 687 F. 2d 74, 77 (5th Cir. 1982)(applying regulation.)

deference. *Philbin*, 929 F. 2d at 324 ("we should give deference to the EEOC's interpretation"); *Peterson*, 888 F. 2d at 1309 (stressing this Court's admonition that "the EEOC's interpretation of Title VII is entitled to deference if it is reasonable.")

The linchpin of the Fourth Circuit's decision in the instant case was its view that Title VII unambiguously precludes relation-back of a later-filed sworn charge. (Pet. App. 5a-6a). The Fifth[13], Sixth[14] and Seventh[15] Circuits have held, to the contrary, that Title VII permits such relation-back even in the absence of the regulation. On this view, EEOC is required to do what the Fourth Circuit decision forbids--treat as sufficient an unsworn charge if a later verified charge is filed.

In addition to these circuits, decisions in the Second, Ninth and District of Columbia Circuits have applied or cited with approval the relation-back provision of section 1601.12(b). *Simpkins v. Washington Metropolitan Area Transit Authority*, 1997 WL 702349 * 3(D.C.Cir. 1997); *Casavantes v. California State University, Sacramento*, 732 F. 2d 1441, 1443 (9th Cir. 1984); *EEOC v. Sears, Roebuck & Co.*, 650 F. 2d 14, 18 (2d

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[13] *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 231 (5th Cir. 1969)(quoting Seventh Circuit opinion in *Choate*).

[14] *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 357 (6th Cir. 1969)("a reading of the entire statute makes it clear that the Congressional intent in requiring an oath is to prevent the harassment of respondents by reckless charges. However, this purpose can be served by requiring verification before action is taken by the Commission . . . . Accordingly, courts have consistently held that a charge filed within [the limitations period] need not be accompanied by the oath of the complainant. Sworn verification may occur later.")

[15] *Philbin*, 929 F. 2d at 324 ("While the statute does require that a complainant verify a charge, the statute does not require that the verification take place prior to the expiration of the 300-day time period"); *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357, 359-60 (7th Cir. 1968)("When the statute is thus considered, it is clear that the requirement for verification of charges lodged with the Commission relates solely to the administrative rather than to the judicial features of the statute. We believe that the provision is directory and technical rather than mandatory and substantive. . . . If the Commission undertakes to process a charge which is not 'under oath,' we perceive no reason why the district court should not treat the omission of the oath as a permissive waiver by the Commission.")

Cir. 1981). Many of the decisions in other circuits have upheld as sufficient under Title VII complaints, as here, contained in unsworn letters to the EEOC. *E.g.*, *Simpkins v. Washington Metropolitan Area Transit Authority*, 1997 WL 702349 * 3 (D.C.Cir. 1997); *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 356 (6th Cir. 1969); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 464 (5th Cir. 1969).

The decision of the Fourth Circuit requires a basic change in the manner in which the EEOC processes letters, Intake Questionnaires, and other written complaints from discrimination victims in that circuit. Until now, pursuant to section 1601.12(b), the EEOC has had a uniform national processing system, under which an unsworn but otherwise sufficient written complaint was deemed to satisfy the Title VII filing deadlines. The EEOC Compliance Manual, for example, specifically directs agency employees to treat a letter to the Commission as a charge.[16] EEOC officials, as here, contact the complainant, obtain any useful clarification or additional details, and then embody all relevant information in an EEOC-drafted charge to be sworn to by the complainant. In the EEOC's fifty local offices, agency officials, discrimination victims and attorneys alike have relied on this legal scheme, focusing their attention on the substance of the charge, confident that the filing deadline had already been satisfied.

The decision of the Fourth Circuit threatens in several ways this longstanding legal scheme. First, the EEOC can no longer utilize a single national processing scheme; now the agency must process differently complaints from employees in the five states in the Fourth Circuit. The use of informal Intake Questionnaires would probably have to be abandoned in favor

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[16] EEOC Compliance Manual, Volume I, § 1.6(a) at 1:0002 (12/92)(BNA):

> "Correspondence is considered a charge if it contains a Title VII or ADEA basis; an indication that the allegation concerns employment; and the identities of the parties, either by name or by sufficient unique description. Correspondence which presents an apparent or potential Title VII, ADEA or EPA basis will be acknowledged and processed . . . . Arrange for a phone or in-person interview."

See id. at §2.2.

of insisting that every complainant who visits an EEOC office sign an affidavit on the spot, without any opportunity for a reasoned analysis of the complainant's problem by agency professionals. Complainants in the Fourth Circuit who cannot come in person to one of the EEOC offices would as a practical matter have a shorter period of time than others in which to contact the EEOC; a letter received by the EEOC in that circuit shortly before expiration of the statutory deadline would not allow the agency sufficient time to obtain from the complainant a second, sworn statement. The EEOC's Washington, D.C. office, which handles complaints from the Maryland and Virginia suburbs as well as from the District of Columbia, will have to use different procedures depending on whether the employee, if forced to litigate his or her claim, would bring suit in the District of Columbia or Fourth Circuit.

Second, in the ten states located in the First, Third and Eleventh Circuits, which have yet to address this issue, EEOC officials cannot know how to handle a charge submitted before the filing deadline but only verified thereafter. The decisions in the Third and Eighth Circuit hold that such charges should be dismissed as untimely, but under section 1601.12(b) and the Compliance Manual such charges are timely, and decisions in the Second, Fifth, Sixth and Seventh Circuits insist that the charges be treated as timely regardless of whether there is an EEOC regulation on the subject.

Third, in the seven circuits which have upheld or applied section 1601.12(b), the Fourth Circuit decision--even more than the earlier Eighth Circuit caselaw--raises serious uncertainty as to whether EEOC officials who treat unsworn charges as sufficient to meet the filing deadlines may be misleading complainants and inducing them to forfeit their rights. The Commission, whose regulation has been upheld in these circuits, cannot reasonably be expected now to disregard that regulation on the basis of a divided Fourth Circuit decision. Yet the possibility that this Court may at some point in the future side with the Fourth Circuit, or that one of these seven circuits may now decide to reconsider the matter en banc, makes continued adherence to the regulation perilous.

We believe that section 1601.12(b) is valid, and that certiorari should be granted to confirm the correctness of the

EEOC's long established practice. If, however, the Court were ultimately to conclude that the regulation is invalid, this should be addressed now, before countless additional discrimination victims have relied to their detriment on the regulation and related agency practice.

If section 1601.12(b) is to be struck down, equitable tolling should be applied to complainants, like petitioner, who relied upon that regulation to their detriment. In other contexts this Court has recognized that equitable tolling is appropriate where a claimant has "fil[ed] a defective pleading during the statutory period." *Irwin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 96 (1990). As the EEOC observed in circumstances similar to the instant case, "a trained attorney looking into the charge filing requirement . . . would have discovered that EEOC regulations and procedures provided that" an unsworn charge was sufficient to preserve Title VII rights.[17] "It would be unfair to [petitioner] to bar [his] claim based on the failure to comply with any technical requirements that this Court might now identify above and beyond those recognized by EEOC."[18] Even the Commission itself understood prior to the instant decision that Fourth Circuit caselaw had accepted section 1601.12(b).[19]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

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[17] Brief of the EEOC as Amicus in support of Appellant, Shempert v. Harwick Chemical Corp., No. 97-1634 (8th Cir), 19 n.9.

[18] *Id.* at 17.

[19] *Id.* at 12-13 n.4; Brief of the EEOC as Amicus Curiae, Tinsley v. First Union National Bank, No. 97-2640, 11.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

Leonard EDELMAN,
Plaintiff-Appellant,

v.

LYNCHBURG COLLEGE,
Defendant-Appellee.

No. 99-2408

Argued: June 8, 2000
Decided: Oct. 2, 2000

Affirmed and remanded.

Luttig, Circuit Judge, filed concurring opinion.

Before WILKINS and LUTTIG, Circuit Judges, and BEEZER, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

BEEZER, Senior Circuit Judge:

Leonard Edelman appeals the district court's dismissal of his employment discrimination action for lack of subject matter jurisdiction. This case presents an issue of first impression in this circuit: whether 29 C.F.R. § 1601.12(b), a regulation promulgated by the Equal Employment Opportunity Commission ("EEOC"), conflicts with the statutory requirements of Title VII of the Civil Rights Act, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1), to the extent that the regulation permits a charge of discrimination to be verified after the expiration of the applicable limitations period. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we conclude that, so applied, the EEOC regulation is contrary to the plain language of the statute, we affirm the dismissal of

Edelman's action on the grounds that he failed to file a timely charge of discrimination.

I

Edelman, a white Polish-Jewish male biology professor, was denied tenure by Lynchburg College on June 6, 1997. On November 14, 1997, Edelman sent a letter to the EEOC alleging that he had been subject to "gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." According to Edelman, Jacqueline Asbury, the Dean of the College, opposed his tenure because she wanted to improve the percentage of tenured women on the faculty. Edelman claims that Asbury ignored the uniform support of his department chairman, an ad hoc faculty committee, and the Faculty Personnel Committee. At the conclusion of his letter, Edelman wrote, "I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of Trustees) and I call upon the EEOC to investigate this case [.]" Edelman's letter was received by the EEOC on November 18, 1997.

On November 26, 1997, Edelman's attorney sent another letter to the EEOC that stated:

> Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college. It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.
>
> * * *
>
> Finally, please have the investigator contact this office to schedule the interview at a mutually convenient time.

Shortly thereafter, the EEOC sent a letter to Edelman advising him that it needed additional information in order to investigate his case. The EEOC's letter urged Edelman to set up an interview "as soon as possible because a charge of

discrimination must be filed within the time limits imposed by law[.]"

On February 17, 1998, the EEOC sent Edelman an appointment notice advising him that his interview was scheduled for March 3, 1998. The interview was conducted as scheduled. On March 18, 1998, the EEOC mailed a draft charge to Edelman for his signature. Edelman's verified charge of discrimination was filed with the EEOC on April 15, 1998--313 days after the date of alleged discrimination.

The EEOC did not assign a number to Edelman's case until after it received his verified charge. Approximately one week later, the EEOC forwarded the charge to both Lynchburg College and the Virginia Council of Human Rights ("VCHR"), the state agency authorized to seek relief from unlawful employment practices. After completing its investigation, the EEOC issued Edelman a right-to-sue letter on March 26, 1999.

Edelman initially filed this action in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. Lynchburg College removed the action to federal court after Edelman amended his complaint to assert a cause of action under Title VII, 42 U.S.C. §§ 2000e through 2000e-17. Lynchburg College then moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Because the district court concluded that Edelman failed to timely file his charge of discrimination, it granted Lynchburg College's motion, dismissed the Title VII claim, and remanded Edelman's remaining claims to state court. Edelman timely appeals.

II

We review de novo a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Evans v. B.F. Perkins Co*, 166 F.3d 642, 647 (4th Cir.1999).

In order to assert a Title VII claim in federal court, a plaintiff must first exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *See Taylor v. Virginia Union Univ.*, 193 F.3d 219, 239 (4th Cir.1999). Title VII establishes two potential limitations periods within which the discrimination charge must be filed with the EEOC. *See* 42

U.S.C. § 2000e-5(e)(1); *see also Tinsley v. First Union National Bank*, 155 F.3d 435, 439 (4th Cir.1998). The basic limitations period is 180 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). The limitations period is extended to 300 days, however, in "deferral states." *See id.* § 2000e-5(e)(1).

A "deferral state" is one which has a state law "prohibiting the unlawful employment practice alleged" and a state or local agency authorized "to grant or seek relief" from the practice. *See id.* 2000e-5(c). Virginia is a "deferral state." *See Tinsely*, 155 F.3d at 440. Accordingly, the 300-day limitations period applies to Edelman's Title VII claim.

III

Edelman argues that the district court erred in dismissing his Title VII claim because his April 15, 1998 charge of discrimination related back to his November 14, 1997 letter and was thus timely filed within 300 days of June 6, 1997, the date of the alleged discrimination. Title VII states that charges of discrimination "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The relevant EEOC regulation states that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Edelman's letter was mailed to the EEOC within 300 days and sufficiently identified the parties and the alleged discriminatory action. However, the letter was not sworn to under oath or affirmation. Nevertheless, Edelman relies on the second sentence of the regulation, which provides that "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments ... will relate back to the date the charge was first received." *Id.*

The parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties disagree, however, as to whether the regulation may be so applied.

In order to answer this question, we must carefully consider the relationship between the regulation (Section 1601.12(b)) and the statute (Title VII, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1)). We begin with the framework established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-43.

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court considered the Chevron framework in the specific context of Title VII. The Court made clear the standard by which we are guided:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Id. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)).

Step one of the *Chevron* analysis, as confirmed by *Robinson*, requires us to determine whether Congress has expressed its intent with respect to the issue at hand. In undertaking this analysis, we are mindful that "agency power is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir.1998) (quoting *Ernst &*

Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976)) (internal quotation marks and other citations omitted).

The precise question at issue in this case is whether verification must occur within the statutory limitations period. "[T]he first place where we must look to see if Congress has spoken to the issue with which we are concerned and whether Congressional intent in that regard is clear is on the face of the statute." *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir.1995). As we have earlier stated, "[s]tatutory construction must begin with the language of the statute." *Id.*

We conclude that Congress has unambiguously spoken on this issue. As noted above, the language of the statute itself requires that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The plain meaning of this language compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, it is not a charge.

In defining a charge, Congress chose to limit the EEOC's authority. While Congress expressly delegated to the EEOC the power to delineate the form and content of the charge, it did not give the EEOC authority to tamper with the oath or writing requirements. Nor did Congress give the EEOC authority to alter the limitations period. On the contrary, the statute affirmatively and plainly establishes the time period within which a charge must be filed. *See id.* § 2000e-5(e)(1).

Because a charge requires verification, *see id.* § 2000e-5(b), and because a charge must be filed within the limitations period, *see id.* § 2000e-5(e)(1), it follows that a charge must be verified within the limitations period. Thus, to the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII.

Having concluded that application of the EEOC's regulation in this case contravenes Congress's intent, as expressed through the plain language of the statute, we need not proceed further. Step two of the *Chevron* analysis does not come into play, and we do not apply the EEOC regulation. *See*

Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *see also Brown & Williamson*, 153 F.3d at 161 ("It is only if the intent of Congress is ambiguous that we defer to a permissible interpretation by the agency.").

The Supreme Court has long adhered to the rule that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9. *See, e.g., FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("[Courts] must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); *NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions."); *Webster v. Luther*, 163 U.S. 331, 342 (1896) ("But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute").

Likewise, this circuit has refused to defer to agency interpretations that are contrary to the statute at issue. *See, e.g., In re Apex Express Corp.*, 190 F.3d 624, 641 (4th Cir.1999) ("Here, there is no ambiguity in the text of the statute to justify the [agency's] position or a turn to legislative history."); *Cabell Huntington Hosp. v. Shalala*, 101 F.3d 984, 988 (4th Cir.1996) ("We cannot endorse the Secretary's reading. To do so, we would have to violate both a clear canon of statutory construction, and the plain meaning of the two terms.").

In keeping with the tradition that requires us to protect the will of Congress, we hold that the regulation, 29 C.F.R. § 1601.12(b), may not be applied to allow Edelman's untimely charge to relate back to his November 14, 1997 letter.

IV

Edelman argues that our decision today conflicts with our earlier discussions of the regulation in *Tinsely v. First Union National Bank*, 155 F.3d 435 (4th Cir.1998), and *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir.1994). We disagree.

In *Balazs*, the earlier of the two cases, we addressed the regulation in the context of a plaintiff's attempt to verify his allegations of discrimination almost four months after the EEOC issued plaintiff a right-to-sue letter and terminated its processing of his case. *See Balazs*, 32 F.3d at 157. The plaintiff made two arguments on appeal: first, that a charge of discrimination did not require verification; and, second, that an unverified charge may be cured by amendment. *See id.* at 156. We rejected outright the plaintiff's first argument, concluding, as we conclude today, that "a sworn charge of discrimination with the EEOC is a mandatory prerequisite to the validity of the charge." *Id.*.

With respect to the plaintiff's second argument in *Balazs*, although we noted that "[i]t has been held that this regulation is valid and is not contrary to the statute requiring verification of charges," *id.* at 157 (citing *Peterson v. City of Wichita*, 888 F.2d 1307, 1308-09 (10th Cir.1989)), we refused to apply the regulation under the facts of the case, *see id.* We expressed our concern that "[c]arried to its logical conclusion, under the EEOC's interpretation of its regulation it would never be too late to verify a charge[.]" *Id.* Thus, we determined that "a reasonable construction" of the regulation would "simply allow charges to be verified and to relate back only so long as the charge is a viable one in the EEOC's files [.]" *Id.* Here, we similarly conclude that a reasonable construction must be imposed on the regulation, one which does not allow relation-back of the verification requirement beyond the time limitation prescribed by Congress.

We briefly mentioned both the regulation and *Balazs* in a footnote in *Tinsley*:

> The district court also rejected Tinsley's claim that her untimely formal charge amended and related back to her timely-but-unsworn letter. In so ruling, the district court inexplicably ignored the applicable EEOC regulation, 29 C.F.R. § 1601.12(b), which explicitly allows such an amendment. What is more, the district court ignored the recent conclusion of this Circuit approving the very use of the regulation that Tinsley, joined by the EEOC, urges: allowing her verified claim to amend and relate back to the date her unverified claim was filed.

Tinsley, 155 F.3d at 439 n. 2 (citing *Balazs*). We noted, however, that in light of our conclusion that Tinsley's verified charge was filed within the applicable limitations period, which we held to be 300 days rather than 180, there was no need to address the regulation. *See id.* ("Because we hold that the appropriate statute of limitations period was 300 days, we need not resolve any of these other questions."). Thus, the most that can be said about our discussion of the regulation in Tinsley is that it is dictum. Moreover, contrary to Edelman's characterization, the facts of this case are materially different from those of Tinsley. Tinsley verified his allegations of discrimination within the statutory time period, whereas Edelman did not.

V

Although our decision today is consistent with our prior discussions of the regulation, we are mindful that our analysis conflicts with that of several other circuits.

In *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir.1991), the Seventh Circuit reversed a decision of the district court dismissing the plaintiff's Title VII action as untimely. *See id. at* 322. The *Philbin* court held that a timely filed Intake Questionnaire, which is verified after the

limitations period, may be sufficient to constitute a charge.* *See id. at* 323.

The court relied on two factors in reaching its decision. First, the court stated that "Title VII is remedial legislation which must be construed liberally." *Id.* Citing its previous decision in *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir.1968), in which it stated that the verification requirement was "directory and technical rather than mandatory and substantive," *Choate*, 402 F.2d at 359, the *Philbin* court concluded that "[i]n keeping with the broad purposes of the act, the omission of technical requirements which are later fulfilled should not affect the timeliness or validity of the charge." *Philbin*, 929 F.2d at 324.

In contrast to the Seventh Circuit, we have previously held that the oath requirement contained in Title VII "is cast in mandatory terms." *Equal Employment Opportunity Comm'n v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir.1978). We also noted then, as we confirm now, that we "see no reason to ignore the plain language that Congress has enacted." *Id.*; *accord Hamel v. Prudential Ins. Co.*, 640 F.Supp. 103, 105 (D.Mass.1986) ("Although an Intake Questionnaire is signed, it is not signed under oath. Any suggestion that this distinction is formalistic tends to ignore the significance of a perjury conviction.").

The second factor relied upon by the *Philbin* court was "the deference accorded EEOC regulations." *Philbin*, 929 F.2d at 324. In applying the *Chevron* analysis, the court failed to give sufficient weight to the plain language of the statute, focusing instead on whether the EEOC's regulation represented a reasonable interpretation of the statute. The court did note,

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* The court did not go so far as to say that a subsequently-verified Intake Questionnaire will always constitute a charge. *See Philbin*, 929 F.2d at 324. Instead, the court considered the EEOC's treatment of the questionnaire. Specifically, the court recognized that the EEOC had not only assigned a charge number to the questionnaire within the 300-day time period, but also notified Philbin's employer within the same period. *See id.* In Edelman's case, the EEOC neither assigned a charge number nor notified Lynchburg College of Edelman's claim within the 300-day limitations period.

however, that "[w]hile the statute does require that a complainant verify a charge, the statute does not require that the verification take place prior to the expiration of the 300-day time period." *Id.*

As discussed in Section III above, we read the plain language of the statute differently. Moreover, while we recognize the remedial nature of Title VII, we see no reason to distort Congress's mandate that charges be timely verified in order to make room for the EEOC's regulation. Cf. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 (1984) (holding that there is "no satisfactory basis for giving Title VII actions a special status under the [Federal] Rules of Civil Procedure").

Finally, we note that the Seventh Circuit is not the only other circuit to have addressed the conflict between the EEOC regulation and the statutory provisions of Title VII. Other circuits have approved the application of the regulation to permit the relation-back of charges that were verified after the limitations period. *See Peterson v. City of Wichita*, 888 F.2d 1307, 1308 (10th Cir.1989) (rejecting the district court's conclusion that regulation was contrary to statute and thus beyond EEOC's power to promulgate); *Casavantes v. California State Univ.*, 732 F.2d 1441, 1442-43 (9th Cir.1984) (noting that its position is "consistent with the recent trend in Title VII jurisprudence which recognizes the importance of nontechnical interpretations of the procedural requirements inherent in the processing of discrimination claims"; condemning contrary position as "overly formalistic"); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir.1982) (reversing summary judgment in favor of employer because factual issues remained as to whether form completed by plaintiff constituted "charge" and as to whether EEOC waived verification requirement). But *see Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir.1998) (holding that Intake Questionnaire does not constitute a "charge" because it is not verified and that regulation only allows an amendment to relate back to the date a charge is first received).

We disagree with these decisions, in short, because we believe that they improperly substitute policy justifications for clear statutory language. *See* Kenneth Culp Davis & Richard

J. Pierce, Jr., *Administrative Law Treatise* §§ 3.2, 3.3 (3rd ed.1994) (discussing *Chevron*'s attempt to curtail judicial policy-making).

V

Although we conclude that Edelman failed to timely file a charge of discrimination, we recognize that this failure does not deprive the court of subject matter jurisdiction. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). But *see Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 137 (4th Cir.1995) (discussing Title VII's exhaustion requirement in jurisdictional terms).

Before we affirm the dismissal of Edelman's Title VII claim, we consider whether the facts of this case warrant equitable tolling of the limitations period. Edelman was represented by counsel at all stages of the administrative process. In fact, his initial letter to the EEOC referenced his attorneys by name. Despite the fact that Edelman attempts to attribute significant delay to the EEOC's processing of his complaint, he waited more than five months after the alleged discrimination before even contacting the agency. Moreover, the EEOC mailed the draft charge to him before the expiration of the limitations period. Had he promptly signed and returned the proposed draft, which included a form of oath or affirmation, his charge would have been timely filed.

We hold that Edelman is not entitled to equitable tolling of the limitations period. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.").

VII

We believe this case is best summed up in the words of the Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be

> disregarded by courts out of a vague sympathy for particular litigants.... [I]n the long run, experience teaches that strict adherence to the procedural requirements specified *512 by the legislature is the best guarantee of evenhanded administration of the law.

Baldwin County Welcome Ctr., 466 U.S. at 152, 104 S.Ct. 1723.

The judgment of the district court dismissing Edelman's action is affirmed, but on remand the district court should take proper action to indicate that the dismissal is for failure to exhaust administrative remedies rather than for lack of subject matter jurisdiction.

AFFIRMED AND REMANDED.

LUTTIG, Circuit Judge, concurring:

I would decide this case on the narrow ground that Edelman's second filing is ineligible for relation back because (1) Edelman characterized his initial filing as a *request* for a charge rather than as a charge; (2) the EEOC did not even treat Edelman's original filing as a charge; (3) the EEOC never served a copy of the letter on Lynchburg College; and (4) the second sworn letter, which allegedly amended the first letter, even alleges different discriminatory conduct than that charged in the original letter.

I am sufficiently uncomfortable with the broader ground for decision set forth in the majority opinion, that verification may never relate back after 180 days from the date of the alleged discriminatory action, that I am unable to concur in the opinion for the court. As to this issue, we are not confronted with a single statute stating either by terms or in effect that "a verified charge must be filed within 180 days of a discriminatory action." Were we confronted with a single statute worded in this way, then the plain meaning interpretation advanced in the opinion for the court would, I think, be unassailable. Instead, we are presented with two statutes, the first providing that a charge shall be filed within 180 days of the unlawful employment practice, and the second providing that charges shall be in writing and include an oath or affirmation.

Although I confess some uncertainty as to this, it seems to me that, between these two statutes, there is not *necessarily* the nexus required in order to sustain the plain meaning interpretation advanced in the opinion. That is to say, it seems to me *at least plausible* to read the first statute to require simply that a charge be filed within 180 days, and the second as freestanding of the first, and simply to require that, before a charge is finalized, all of the allegations and information required by the EEOC be provided and verified. Of course, if the two statutes are so read as temporally independent of each other, or at least not temporally coterminous, then there is no statutory requirement that the charge be verified within the 180 days, and relation back would be available by regulation.

Apart from what I believe is its inherent structural logic, this interpretation is plausible because there is no statutory

definition of "charge," contrary to the implicit premise of the majority's opinion. There is no statutory definition that provides that, in order to constitute a "charge," an allegation must be verified. Thus, the "charge" that must be filed within 180 days need not--at least need not by definition--be an allegation that is verified or that includes all the information that eventually must be provided before it is sufficiently complete to require notice to the employer. Insofar as the statute informs us, the "charge" that must be filed within 180 days can be merely an allegation of discrimination; it need not be verified.

As precisely as I can state it--and I readily concede that the point is conceptually elusive--the majority's interpretation seems to me actually to depend entirely upon reading the two statutes as if they were one. And I fear that it is *only* through reading the two as one that the nexus necessary to the majority's interpretation is supplied; in other words, unless the two statutes are read as one, I believe that it is impossible to say, with the certainty necessary to abrogate the agency's contrary interpretation, that a charge must be filed *and* verified within 180 days of the alleged discriminatory action.

I do not believe that the alternative interpretation I suggest is the only interpretation of the two statutes, by any means. Indeed, I do not even believe that it is the better interpretation; in fact, I believe that the one adopted by the majority is the better. But I do believe that this alternative interpretation of the agency is a plausible one. And, of course, being such, we are bound to give deference to that administrative interpretation.

For these reasons, I concur only in the judgment of the court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

ORDER

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Defendant Lynchburg College, having removed the action to this Court, filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth in the attached Memorandum Opinion, Defendant's motion to dismiss the Title VII claims is GRANTED. Because this Court lacks jurisdiction over the remaining claims, they are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order and the attached Memorandum Opinion to all parties and counsel of record.

ENTERED: [Norman K. Moon]
United States District Judge

9-20-99
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Lynchburg College removed the action to this Court and filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Because Dr. Edelman failed to timely file his claim with the Equal Employment Opportunity Commission, Lynchburg College's motion to dismiss the Title VII claims is GRANTED. The remaining state law claims are REMANDED to the Circuit Court for the City of Lynchburg, Virginia.

I. BACKGROUND

Dr. Leonard Edelman, a Jewish white male, was hired by Lynchburg College (hereinafter "the College") as an Assistant Professor in 1993. Dr. Edelman entered into Lynchburg College's formal tenure evaluation process in the fall of 1996. He received tenure recommendations from the Chairman of the Biology Department and an ad hoc committee of the faculty. However, Dean Jacqueline W. Asbury recommended to President Charles Warren that tenure be denied. On May 23, 1997, President Warren informed Dr. Edelman by letter that the College's Board of Trustees had accepted his subsequent recommendation not to award Dr. Edelman tenure.

On November 14, 1997, Dr. Edelman sent a letter to the Equal Employment Opportunity Commission (hereinafter "EEOC") "request[ing] to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning [him] during January-June, 1997 culminating in the denial of [his] continued employment at the college." In this letter, which was not made under oath or affirmation, Dr. Edelman stated his belief that this case was "one of gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." The November 14 letter was followed by a letter from Dr. Edelman's counsel on November 26, 1997, which stated that "Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college." Counsel concluded the November 26 letter by stating that it was his "understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997." On December 3, 1997, Rosalind Hall-Smith, the EEOC Supervisor of the Charge Receipt/Technical Informational Unit, responded to the November letters by statuting that more information was needed before the matter could be pursued any further. Hall-Smith's letter concluded by stating that the EEOC would assume that Dr. Edelman did not intend to file a charge of discrimination with them if the EEOC did not hear from him within 30 days of the December 3 letter.

The EEOC conducted an interview with Dr. Edelman on March 3, 1998. On March 18, 1998, the EEOC sent Dr.

Edelman a Charge of Discrimination form which it had prepared after the March 3 interview. Dr. Edelman signed the Charge of Discrimination form and declared, under the penalty of perjury, that he believed that he was "denied tenure and terminated because of [his] sex (male) in violation of Title VII of the Civil Rights Act of 1964, as amended." Dr. Edelman did not check the box on the Charge of Discrimination form beside the statement: "I want this charge filed with both the EEOC and the state or local Agency, if any." The Charge of Discrimination form stated that the earliest and latest date of discrimination was June 6, 1997. Upon the filing of the Charge of Discrimination on April 15, 1998, the EEOC designated Dr. Edelman's claims as Charge Number 122980526.

II. DISCUSSION

A *Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction*

A plaintiff has the burden of proving the existence of subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642 (4th Cir. 1999). Lynchburg College now seeks a dismissal for lack of subject matter jurisdiction due to Dr. Edelman's alleged failure to timely pursue EEOC proceedings and state enforcement proceedings under state law with the Virginia Council on Human Rights (hereinafter "VCHR"), which is charged with administering the provisions of the Virginia Human Rights Act (hereinafter "VHRA"). Va. Code § 2.1-714 *et seq.* The pertinent provision of Title VII states:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . **no charge may be filed** . . . by the person aggrieved **before the expiration of sixty days after proceedings have been commenced under the State or local law**, unless such proceedings have been earlier terminated. . . If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and

> signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

41 U.S.C. § 2000e-5(c)(emphasis added). Thus, a plaintiff is required to exhaust administrative and state remedies prior to filing an action in federal court. Typically, a plaintiff litigating a claim under Title VII has 180 days from the time of the aggrieved action in which to file a complaint with the EEOC. 42 U.S.C. § 2000e-5(e). Once the EEOC issues a right-to-sue letter, the plaintiff may then file suit in federal court. If, however, the plaintiff resides in a "deferral state" within the meaning of 42 U.S.C. § 2000e-5(c), the plaintiff will have 300 days in which to commence proceedings under the appropriate state or local law. *See Davis v. North Carolina Dep't of Correction*, 48 F. 3d 134, 137-40 (4th Cir. 1995)(stating that § 2000e-5 requires plaintiff to commence proceedings under state law before the EEOC can act upon federal discrimination claims). A "deferral state" is one which has a state or local law "prohibiting the unlawful employment practice alleged" and a state agency authorized "to grant or seek relief" from the practice. *Id.*; *EEOC v. Hansa Products, Inc.*, 44 F. 2d 191, 192 n. 1 (4th Cir 1988).

Virginia is such a "deferral state" and the VCHR is a "deferral" agency within the meaning of the statute with primary responsibility for enforcement of Title VII. *Capps v. City of Lynchburg*, Civil Action No. 6:99CV0048 (W.D.Va., Lynchburg Div., 08/12/99); *Tinsley v. First Union National Bank*, 155 F. 3d 435 (4th Cir. 1998). Thus, for this Court to have subject matter jurisdiction over Dr. Edelman's complaint, he must have filed a discrimination claim with the EEOC and the VCHR. The EEOC Charge of Discrimination, which was sworn and signed by Dr. Edelman, stated that the last date on which he was discriminated against was June 6, 1997. Thus, the last date for filing, by Dr. Edelman's own calculations beginning with June 6, 1997 as the latest date of discrimination, would be April 2, 1998. Because this Charge of Discrimination was not filed with any agency until April 15, 1998, Dr.

Edelman failed to file within the 300 days allowed in which to commence proceedings.

Dr. Edelman argues that he did timely file his complaint because the November 1997 letters were written and sent within the 300 day time limit. He further argues that the April 15, 1998 Charge of Discrimination relates back to the November 14, 1997 letter and that his filing date should, therefore, be considered as November 14, 1997. While the Code of Federal Regulations provides that "[a] charge may be amended to cure technical defects or omissions . . . ", the problem with the plaintiff's argument is that the November 14, 1997 letter did not constitute a charge to which the April 15, 1998 charge could relate.

Title VII requires charges to be made "under oath or affirmation." 42 U.S.C. § 2000e-5(b). Dr. Edelman's November 14, 1997 letter was not made under oath or affirmation. Title VII requires charges to contain "such information and be in such form as the Commission requires." *Id.* The EEOC responded to the November letters from Dr. Edelman and his attorney by stating that the information provided was not sufficient for the EEOC to continue investigating Dr. Edelman's claim. Title VII states that "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days." *Id.* The EEOC did not serve notice of any discrimination charge on Lynchburg College within ten days of the November letters. In fact, Dr. Edelman's counsel specifically stated in his November 26, 1997 letter that Dr. Edelman wanted an interview with an EEOC investigator before any final charging documents were forwarded to Lynchburg College. The Court further observes that no charge number was assigned to the November 14, 1997 letter, that it was not sent as a charge of discrimination to the VCHR, and that the April 15, 1998 Charge of Discrimination does not even reference it. Thus, the Court agrees with the defendant's assertion that neither Dr. Edelman nor the EEOC proceeded as if the November 1997 letter did, or were intended to,

commence proceedings.[1] Accordingly, the November 14, 1997 letter did not commence proceeding. As a result, there is no charge for the April 15, 1998 charge to relate back. Thus, the filing date is April 15, 1998, which is beyond the 300 days allowed to timely commence proceedings.

Dr. Edelman claims that even if he did not timely commence proceedings, he is entitled to equitable tolling of the filing period. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed. 2d 234 (1982), the United States Supreme Court held that "filing a charge of discrimination with the EEOC is . . . a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Dr. Edelman, however, fails to establish that there are any reasonable grounds in this situation to warrant an equitable tolling of the filing requirements.

Although Dr. Edelman argues that he is entitled to equitable tolling because of the EEOC's delay in responding to his letter, the EEOC interviewed him and then mailed the prepared Charge of Discrimination form to him on March 18, 1998, within the time allowed to commence preceding. The letter attached to the prepared Charge of Discrimination form invited Dr. Edelman to make any necessary corrections. All that Dr. Edelman had to do at that point was to review the form, sign it, check the box that would have simultaneously filed the charge with the VCHR, and mail the charge back to the EEOC in the enclosed postage paid envelope. Because Dr. Edelman has not shown that there was an unreasonable delay on the part of the EEOC from the time that he initially contacted them six months after the last date of discrimination to the time that he received the Charge of Discrimination in the mail, this Court does not conclude that the period of time that lapsed before receiving the prepared Charge of Discrimination warrants an equitable tolling of the time requirements.

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[1] This Court does observe that Dr. Edelman's counsel stated in his November 26, 1997 letter that he assumed that the filing date would be considered as of November 14, 1997. This Court, however, is aware of no authority that would allow a declaration of a party (or a party's counsel) of what should be considered a fling date to circumvent the requirements of Title VII. A filing date is established when proceedings are commenced as contemplated by the provisions of Title VII.

Similarly, the Court also disagrees with Dr,[sic] Edelman's argument that equitable tolling should be granted because Lynchburg College was not unduly prejudiced by his failure to commence proceedings in a timely manner. This argument fails to observe the fact that "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 1726 (1984). Dr. Edelman's situation is not one where the delays of anyone besides himself hindered his ability to timely commence proceedings. The EEOC did not lead him to believe that he had done everything required to commence proceedings. Following the November 1997 letters, the EEOC advised Dr. Edelman that the November 1997 letters were not sufficient and that additional information was needed before the matter could be pursued. Similarly, Dr. Edelman's situation is not one where Lynchburg College engaged in any type of misconduct that would have lulled him into inaction. Thus, there is no independent factor that would warrant equitable tolling. This Court may not grant equitable tolling just because there has not been a showing that Lynchburg College would be prejudiced by extending the time in which Dr. Edelman could have commenced proceedings. As stated by the United States Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. . . . [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Id.

The defendant's motion to dismiss the Title VII claim for lack of subject matter jurisdiction is GRANTED.

B. *Defendant's Motion to Dismiss Other Pending Motions*

Finally, in response to the defendant's 12(b)(6) motion to dismiss the state law claims for failure to state a claim upon which relief can be granted, these claims are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order to all parties and counsel of record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

9-20-99
Date